IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELECTRONICS BOUTIQUE HOLDINGS CORP.,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	
JOHN ZUCCARINI, individually and trading as Cupcake Patrol and/or Cupcake Party,	:	**NO. 00-4055**
Defendant	:	

MEMORANDUM AND ORDER

Schiller, J. **January 25, 2001**

Presently before the Court is Defendant's Motion to Set Aside Judgment (Document No. 15). For the reasons set forth below, Defendant's motion is denied.

I. BACKGROUND

On August 10, 2000, Plaintiff Electronics Boutique Holdings Corporation ("EB") filed a complaint and motion for temporary restraining order and preliminary injunction against Defendant John Zuccarini, alleging, among other charges, ongoing violations of the Anticybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d), as a result of Mr. Zuccarini's registration of five Internet domain names with spellings similar to domain names and service marks registered by EB ("domain misspellings"). Mr. Zuccarini configured the domain misspellings so that when an Internet user enters them, the user's screen is inundated with multiple advertising windows, which automatically appear. The Internet user must click on

each window to close it or to exit the Internet. Mr. Zuccarini is then paid by the advertisers for each click.

On November 3, 2000, four days after this Court entered judgment in favor of EB and granted its request for a permanent injunction and other relief, Mr. Zuccarini appeared for the first time in this action to ask the Court to set aside its judgment,[1] challenging the Court's assertion of personal jurisdiction over the Defendant, who claimed he had never been served with process in this action.[2] The Court scheduled a hearing on Defendant's motion for December 1, 2000.

In order to discover facts necessary to defend the motion, Plaintiff's counsel requested that counsel for Mr. Zuccarini advise him of Mr. Zuccarini's availability for deposition. In response, counsel for Mr. Zuccarini informed counsel for EB that Mr. Zuccarini would not attend a deposition. On November 15, 2000, this Court granted EB's Motion to Compel the Deposition of Defendant John Zuccarini and directed Mr. Zuccarini to appear for deposition at the offices of

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[1]Although Defendant fails to state the procedural basis for his motion, during a telephone conference with the Court, counsel for the Defendant agreed that his motion was premised on Federal Rule of Civil Procedure 60(b).

[2]Mr. Zuccarini and his attorney, Howard M. Neu, Esquire, apparently believe that they are entitled to acknowledge this litigation whenever and to the extent that it suits them. According to Mr. Neu: "On October 13, 2000, I telephoned Mr. Weiner and left a voice mail message for him telling him that I had been engaged by Mr. Zuccarini in this action solely for the purpose of negotiating a settlement of their [sic] claim and that Mr. Zuccarini had called me and told me that he heard that a judgment may have been entered against him following a hearing on October 10, 2000 in this action." (Stipulated Testimony of Howard M. Neu No. 5). Despite full knowledge on the part of Mr. Zuccarini and his lawyer about the proceedings before this Court, Mr. Neu failed to seek admission to this Court so that he could raise any objections to the sufficiency of service or propriety of the Court's exercise of jurisdiction or to defend this action on the merits.

It should be noted that just three days later, Mr. Zuccarini denied knowledge of this action under oath and stated that he had not retained Mr. Neu to represent him in this matter. (Zuccarini Dep. at 147-48, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

counsel for EB at a day and time appropriately noticed by Plaintiff's counsel prior to December 1. (Document No. 20).

That same day, Plaintiff issued a notice of deposition to Mr. Zuccarini for November 21, 2000, at 10:00 a.m., directing Mr. Zuccarini to appear for oral examination and to bring with him certain documents that would reflect his address. Neither Zuccarini nor either of the two attorneys secured by Mr. Zuccarini appeared. Strikingly, neither attorney notified counsel for the Plaintiff that Mr. Zuccarini would not appear and neither attorney was available to take a call from EB's counsel at 10:30 a.m. on November 21.[3]

On November 22, 2000, EB filed a Motion for Contempt or to Strike Motion to Set Aside Judgment. That motion remained unanswered until the Court issued a rule to show cause why Mr. Zuccarini should not be held in contempt for failing to transfer the domain misspellings to

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[3]At the hearing, Mr. Neu was dishonest in explaining the circumstances surrounding Mr. Zuccarini's failure to appear for deposition on November 21, 2000 in compliance with this Court's Order. Mr. Neu stated: "Mr. Zuccarini was never served with a subpoena or any other notice of attending deposition through counsel." (Hearing Trans. at 10). Mr. Calabro, Esquire, who appeared in this matter pursuant Local Rule 83.5.2, explained that he received notice of the deposition and that he sent it to Mr. Neu. (Hearing Trans. at 12). In response to questioning from the Court, Mr. Neu stated and later confirmed that he did not contact counsel for EB to notify him that his client was not going to appear for deposition "[b]ecause I honestly didn't know whether my client was going to be there or not . . ." (Hearing Trans. at 14). The record reveals that Mr. Neu did know. Unbelievably, Mr. Zuccarini was in Mr. Neu's office in Florida on November 21. (Hearing Trans. at 22-23). Incredibly, Mr. Neu's willingness to make false statements to this Court knows no bounds.

Pursuant to Federal Rule of Civil Procedure 37(d), when a party fails to appear for deposition, a court is authorized to accept as true the facts sought to be established. The Court reminded defense counsel of this rule at the December 1 hearing. Mr. Neu indicated that he is aware of the rule and had made his client aware of the rule. (Hearing Trans. at 9-10). Because Mr. Zuccarini failed to appear for his deposition in violation of an Order of this Court, I deem all the facts EB sought to elicit regarding Mr. Zuccarini's residence, receipt of the pleadings, and willful evasion of service established. In the sections that follow, I outline those facts and their bases.

Plaintiff in violation of this Court's October 30, 2000 Order. On January 12, 2001, Mr. Zuccarini responded, arguing that because the Court lacked personal jurisdiction he is not subject to the Court's Order, however, "in an abundance of caution[,]" he would transfer the domain misspellings to the Clerk of Court for the Eastern District of Pennsylvania. (Document No. 36).

On January 15, 2001, the Court held a conference with the attorneys in this matter to explain that Mr. Zuccarini was still in violation of the Court's Order and to provide him with one final opportunity to comply. Mr. Zuccarini was given until Friday, January 19, 2001 to transfer the domain misspellings to the Plaintiff. As part of a continuing pattern of recalcitrance, Mr. Zuccarini failed to acknowledge the Orders of this Court.

Mr. Zuccarini filed a motion to set aside judgment, claiming that the judgment is invalid because he was never properly served in this matter. Plaintiff counters that it has properly served Mr. Zuccarini in accordance with the Federal Rules of Civil Procedure, the Orders of this Court, and the Due Process Clause. I scheduled a hearing in this matter in order to determine the facts and circumstances surrounding EB's multiple efforts to serve Mr. Zuccarini and inform him of the pendency of this lawsuit.[4]

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[4]Two attorneys appeared on behalf of Mr. Zuccarini. Despite the fact that the hearing was held on Defendant's motion, neither attorney was prepared to call any witnesses or offer any other evidence. Howard M. Neu, Esquire, who is a member of the Florida bar, filed a petition for admission *pro hac vice* which was granted on November 30, 2000. (Document No. 29). Mr. Neu's admission was revoked during the hearing because the Court determined that Mr. Neu was not being candid and forthright in his statements to the Court. Pershing Calabro, Esquire, an attorney with 58 years of experience, also appeared on behalf of Mr. Zuccarini. Mr. Calabro declined to cross-examine any of Plaintiff's witnesses or to object to any of the Plaintiff's evidence. (Hearing Trans. at 25-6, 37, 39, 42). In papers filed after the hearing, the Defendant contends that he was denied the opportunity to cross-examine witnesses because Mr. Neu could not properly appear before the Court. (Document No. 37). The Defendant also notes his objections to some of the Plaintiff's evidence. The Defendant's complaints are unavailing. Because both Mr. Neu and Mr. Calabro did not know that Mr. Neu's petition for admission *pro*

II. DISCUSSION

Mr. Zuccarini asks this Court to vacate its judgment pursuant to Federal Rule of Civil Procedure 60(b)(4). Rule 60(b) provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void[.]"[5]

It is well-established that a "default judgment entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside." United States v. One Toshiba Color Television, 213 F.3d 147, 156 (3d Cir. 2000) (quoting Gold Kist, Inc. v.

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hac vice had been granted before appearing in court, Mr. Calabro would have had to have been prepared to proceed. Mr. Calabro was given an opportunity to cross-examine all of Plaintiff's witnesses. He declined to do so. Any objections to evidence are waived.

[5]In determining whether justice favors vacating a default judgment under Rule 60(b), courts in this circuit consider the following three factors: (1) prejudice to the plaintiff if the judgment is vacated; (2) culpability of the defendant in the entry of the judgment; and (3) existence of a meritorious defense. See Adena Corp. v. D'Andrea, 1997 WL 805265, at *2 (E.D. Pa. Dec. 30, 1997). These factors are generally utilized in instances in which judgment is entered without consideration of the merits. Here, the merits of the case were fully evaluated.

Therefore, although the above-mentioned factors are not directly applicable here, I note that all three weigh in favor of the denial of Defendant's motion. First, if judgment were set aside in this matter, the Plaintiff would be severely prejudiced. EB has already incurred more than $50,000 in costs and attorneys' fees in prosecuting this matter. Second, the Defendant is completely and solely culpable for the entry of the judgment against him as he willfully absented himself from the proceedings. Third, Mr. Zuccarini has no meritorious defense. Although there was no mention of any defense at the December 1 hearing, Mr. Zuccarini briefly sets forth a defense in his memorandum of law filed in support of his motion. (Document No. 25). Mr. Zuccarini claims that the websites at issue were blank. This statement is utterly untrue. As this Court observed, the websites were fully operational before they were deactivated by Cavecreek Wholesale Internet Exchange in accordance with the temporary restraining order entered by this Court. The websites contained a barrage of advertising windows. Furthermore, if the websites were blank, Mr. Zuccarini would have had no reason to advise Mr. Fisher at Cavecreek that "[a]s a hosting company you are not responsible for the content of my websites." (Pl. Exh. 16 at Exh. Fisher 4, Aug. 15, 2000 e-mail sent by Mr. Zuccarini to Mr. Fisher in response to notification that the domain misspellings were being deactivated) (emphasis added).

Laurinburg Oil Co., Inc., 756 F.2d 14, 19 (3d Cir. 1985) (citing Rule 60(b)(4))).

The question confronting the Court is whether service of process was properly effected upon Mr. Zuccarini in the instant matter so as to confer upon this Court jurisdiction over the person of the Defendant. As the Supreme Court has instructed, the "service of summons is the procedure by which a court having venue and jurisdiction over the subject matter of the suit asserts jurisdiction over the person of the party served." Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438, 444-45 (1946). Effective service of process must be accomplished in compliance with a specific method of service articulated in the applicable rules of civil procedure and it must comport with the Due Process Clause of the Fourteenth Amendment. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 320 (1950) (finding that the method of service must be compatible with the requirements of the Due Process Clause); Lin v. Pennsylvania Mach. Works, Inc., 1997 WL 364481, at * 1 (E.D. Pa. June 24, 1997) (concluding that "[i]t is axiomatic that the parties' compliance with procedure is what gives this court personal jurisdiction"); Hoffman v. United Telecomm., Inc., 575 F. Supp. 1463, 1469, 1476 (D. Kan. 1983) (noting that in order for personal jurisdiction to be properly asserted both the constitutional and statutory requirements must be satisfied).

A. Statutory Requirements

Federal Rule of Civil Procedure 4(e) governing "Service Upon Individuals Within a Judicial District of the United States" provides:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or incompetent person, may be effected in any judicial district of the United States:
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> (1) pursuant to the law of the state in which the district court is located,

> or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
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> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Because this Court is located in Pennsylvania, Rule 4(e)(1) must be read in conjunction with Pennsylvania law. In Pennsylvania, process may be served, among other ways, by handing a copy to the defendant, to an adult member of the defendant's family who resides with the defendant, to the manager of the defendant's apartment house, or to the defendant's agent at any office or usual place of business of the defendant. See PA.R.CIV.P. 402.

In addition, Pennsylvania Rule of Civil Procedure 430(a) permits a plaintiff to move the court for a special order directing the method of service where service cannot be made under the applicable rule. Due to the extreme difficulty EB encountered in attempting to personally serve Mr. Zuccarini, EB moved, on two separate occasions, for such an Order permitting it to attempt service by alternative methods. On August 15, 2000, this Court authorized EB to complete service through the United States Marshals' Service. See Electronics Boutique Holdings Corp. v. Zuccarini, 00-4055 (E.D. Pa. Aug. 15, 2000) (order granting EB's motion for alternative service, extension of TRO, and continuation of preliminary injunction hearing). On August 29, 2000, this Court authorized EB to "employ alternative means of service reasonably calculated to notify the Defendant, including by certified and regular mail." Electronics Boutique Holdings Corp. v. Zuccarini, 00-4055 (E.D. Pa. Aug. 29, 2000) (order granting preliminary injunction).

Thus, in this case, process is properly served by any of the following methods: (1) handing a copy to defendant; (2) handing a copy to an adult member of the defendant's family who resides with the defendant; (3) leaving a copy at the defendant's home with someone who is living there and is of suitable age and discretion; (4) handing a copy to the manager of the defendant's apartment house; (5) handing a copy to the defendant's agent at defendant's place of business; (6) handing a copy to an agent authorized to receive service of process for the defendant; (7) through the United States Marshals' Service; (8) certified and regular United States mail; and (9) alternative means of service reasonably calculated to provide notice to Mr. Zuccarini.

1. Mr. Zuccarini willfully evaded in-person service.

On August 10, 2000, the date that the complaint and motion for temporary restraining order and preliminary injunction were filed, the Plaintiff sent a private process server to apartment unit D-6 in the Grandview Garden Apartments in Andalusia, Pennsylvania ("Andalusia address"), the address listed by Mr. Zuccarini when he registered the domain misspellings in May of 2000. (Pl. Exh. 3). Mr. Zuccarini lives in an apartment unit inside a building with an outer security door. (Pl. Exh. 21). In order to gain access to the individual apartment units, a resident must unlock the security door. (Pl. Exh. 21). A sign was posted on this outer security door reading, "Deliveries for D-6[.] There is no one available to accept deliveries for D-6 nor will there be for a number of days. Please return to sender all items." (Pl. Exh. 21). The process server rang the buzzer on the outer door for Mr. Zuccarini's apartment unit, but no one answered. (Pl. Exh. 21).

The next day, the process server returned and spoke to an individual in the management

office who confirmed that Mr. Zuccarini was still paying rent and had refused service of process by other persons. (Pl. Exh. 21). The same note remained on the security door and no one answered when the server rang the buzzer. (Pl. Exh 21).

On August 12, 2000, a process server attempted to effect service by ringing the buzzer on the security door. (Pl. Exh. 22). No one responded. (Pl. Exh 22). After being admitted through the security door by a neighbor, the process server knocked directly on Mr. Zuccarini's apartment door and loudly announced his purpose. (Pl. Exh. 22). There was no response. (Pl. Exh. 22). Neighbors identified Mr. Zuccarini's car, a white Toyota with Pennsylvania license plate CEB 8627, which was in a parking lot near the apartment building. (Pl. Exh. 22).

On August 15, 2000, a process server attempted to personally serve Mr. Zuccarini both in the morning and again in the afternoon by ringing the buzzer in order to gain entry into the apartment building. (Pl. Exh. 23). No one responded either time. (Pl. Exh 23).

The United States Marshals' Service also made several unsuccessful attempts to serve Mr. Zuccarini on August 17 and August 24. (Pl. Exh. 14). The same sign identified by the process servers remained. (Exh. 14). Mr. Zuccarini did not answer the security door or the door to his apartment. (Exh. 14). Mr. Zuccarini also failed to respond to a phone message left by Deputy Jerry Riley at the phone number listed by Mr. Zuccarini in registering the domain misspellings (Exh. 14).

In addition, on August 25, 26, 27, and 28, EB attempted to complete service on Mr. Zuccarini through process servers who waited unsuccessfully for several hours at Mr. Zuccarini's apartment building. (Pl. Exh. 13).

Mr. Zuccarini claims that EB's attempts at service were unsuccessful because he moved

his residence from the Andalusia address before the inception of this lawsuit. In his declaration submitted to this Court in support of his motion, Mr. Zuccarini asserts that "[o]n June 4, 2000 I physically removed my residence from Grandview Garden Apartments." At the December 1 hearing, Howard M. Neu, one of Mr. Zuccarini's attorneys, confirmed the position of his client, stating that Mr. Zuccarini "physically removed from the residence on June 4th." (Hearing Trans. at 5). The credibility of Mr. Zuccarini's claim is called into question by several inconsistent and contradictory facts.

First, in a deposition taken in an action involving Maxim magazine alleging similar conduct on the part of Mr. Zuccarini, Mr. Zuccarini refused to squarely provide answers to the questions regarding where he lives.[6] In fielding the questions asked by the attorney for the

[6]The following exchange took place at the deposition:

Q. What is your current address?
A. 957 Bristol Pike, Apartment D-6, Andalusia, Pennsylvania, 19020
Q. Is that where you currently reside?
A. Not necessarily.
Q. Where do you currently reside?
A. I don't have – that's my legal address. I really don't have a permanent address at this time.
Q. Where do you currently reside?
A. Right now I am staying at the Millennium Hotel in New York.
Q. In New York?
A. Right.
Q. When you are not in New York for a deposition, where do you live? Where have you lived in the past two weeks?
A. I have been living in various places.
Q. What are the various places that you have been living?
A. Friends' places. You know, that type of thing. Different hotels.
Q. Different hotels?
A. Right.
Q. 957 Bristol Pike is not your residence?
A. No, it's not. It's my legal address. I have a lease on the apartment and that's where I have – some things are sent there which I get.

plaintiff, Mr. Zuccarini did make a statement different from the one he made in the declaration he made under penalty of perjury for purposes of the instant proceeding. During his deposition, he said under oath that he had not lived at the Andalusia address since "the end of June." (Zuccarini Dep. at 11, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

Second, on June 27, 2000, the first cease and desist letter from counsel for EB was delivered to Mr. Zuccarini at the Andalusia address via Federal Express. The Federal Express signature log shows that "John Zuccarini" signed for the package. (Pl. Exh. 29). The signature for the Federal Express package is identical to the signature on a rent check submitted by Mr. Zuccarini to his landlord. (Pl. Exh. 36). The signature for the Federal Express letter is also identical to the signature that appears on the declaration of John Zuccarini submitted by the Defendant in support of his motion to set aside judgment. (Document No. 17). Therefore, there is no question that the cease and desist letter was received by the Defendant.[7]

> Q. Do you live in Pennsylvania?
> A. I don't know. I don't have a permanent address so I can live anywhere. I don't live anywhere right now. I can't give you a permanent address.
> [A discussion was held off the record].
> A. That's my legal address but I don't reside there. I don't live there. It's actually not – You know, I can say right now it's my permanent like legal address but I don't live there. I haven't since the end of June.

(Zuccarini Dep. at 9-12, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

[7]In papers submitted after the December 1 hearing, Mr. Zuccarini notes his objection to the Court's determination of whether Mr. Zuccarini's signature appears on the Federal Express log, complaining that EB did not offer the opinion of a handwriting expert. Although, Mr. Zuccarini's objection is untimely, I note that pursuant to Federal Rule of Evidence 901(b)(3), handwriting can be authenticated by the trier of fact where, as here, the handwriting at issue is compared with authentic specimens. Here, there can be no dispute that Mr. Zuccarini's signature appears on his declaration to this Court. In addition, no objection was raised at the hearing as to whether Mr. Zuccarini signed a check printed with his name and address enclosed in letter to

Third, Mr. Zuccarini continued to receive mail at the Andalusia address for approximately three months following his alleged relocation. It was not until August 31 that Mr. Zuccarini completed the paperwork to request that his mail be forwarded to a post office box located at the post office servicing the Grandview Garden Apartments. (Pl. Ex. 47). Mr. Zuccarini's application for the corresponding post office box is stamped September 1. (Pl. Exh. 46).

Fourth, on September 26, 2000, Mr. Zuccarini sent a package via Federal Express on which he listed the Andalusia address as his return address. (Pl. Exh. 24, Second Weiner Decl. at Exh. "A").

Fifth, in late October or early November, Mr. Zuccarini wrote a letter to Dianne Taylor, office manager for the Grandview Garden Apartments, stating that he wished to extend his lease. (Pl. Exh. 36). He enclosed two checks, totaling $2,590.00. (Pl. Exh. 36). Despite paying four month's rent in advance, Mr. Zuccarini claims he hired someone to remove all of his remaining personal items from his apartment on November 10, 2000. (Pl. Exh. 37). Although Mr. Zuccarini stated that he was not personally on the property when his personal items were removed, Mr. Neu told the Court on December 1 that he had no reason to doubt that a maintenance man saw Mr. Zuccarini's car on the property on November 10. (Hearing Trans. at 24). Shortly thereafter, by letter of November 21, 2000, Mr. Zuccarini gave 60 days notice of his intent to terminate his lease at Grandview Garden Apartments. (Pl. Exh 37).

The Court's attempts to reconcile the conflicting evidence at the hearing proved to be

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Dianne Taylor, the office manager for the Grandview Garden Apartments, asking to extend his lease. (Pl. Exh. 36). In fact, Mr. Calabro identified the handwriting in the letter to Ms. Taylor as belonging to Mr. Zuccarini. (Hearing Trans. at 32).

futile. Mr. Neu claimed that although he does not know Mr. Zuccarini's address, his address is "someplace in New Jersey." (Hearing Trans. at 3). Mr. Neu added that Mr. Zuccarini lived in Florida during November of 2000 and prior to that time he was residing at a Holiday Inn hotel in the Philadelphia area. (Hearing Trans. at 3-4). Mr. Neu claimed not to know which Holiday Inn. (Hearing Trans. at 4).

2. Mr. Zuccarini received copies of the summons and complaint by certified and regular mail.

EB sent at least eight packages containing the pleadings and Orders of this Court to Mr. Zuccarini at the Andalusia address by either certified or regular United States mail between August and November of 2000. All of the packages could be identified as being sent by counsel for EB as they bore the name and address of the law firm representing EB. The certified mail was returned with a stamp reading "unclaimed." (Pl. Exh. 39). The packages sent via regular mail were returned with handwritten notations such as "RETURN TO SENDER NO FORWARD ADDESS" (sic) and "Moved Return to Sender No Forwarding Address." (Pl. Exhs. 38, 40-45).

Meanwhile, on August 10, 2000, Mr. Neu sent the complaint and motion for temporary restraining order and preliminary injunction to Mr. Zuccarini at the Andalusia address. (Stipulated Testimony of Howard M. Neu No. 4). Curiously, there is no indication that the package sent by Mr. Neu was returned.

The Court examined the handwriting on the packages sent to Mr. Zuccarini, which were returned to EB, in addition to a letter handwritten by Mr. Zuccarini to Ms. Taylor and accompanying rent check signed by John Zuccarini. (Pl. Exhs. 36-45). The notations on the

mail returned to Plaintiff's counsel were clearly penned by the same hand that penned the letter to Ms. Taylor. It is undisputed that Mr. Zuccarini wrote the letter to Ms. Taylor. This Court therefore finds that Mr. Zuccarini received the packages sent by EB's counsel and had the mail returned by making various notations on the envelopes.[8]

Although Mr. Zuccarini's absence prevented the Court from obtaining information directly from Mr. Zuccarini, the Court accepted into evidence Mr. Zuccarini's sworn deposition in the Maxim magazine case taken on October 16, 2000. During the deposition, Mr. Zuccarini was asked about the manner in which he receives mail.[9] His responses were puzzling.

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[8]Again, in post-hearing papers, Mr. Zuccarini challenges the propriety of the handwriting comparison conducted by the Court. Federal Rule of Evidence 901(b)(3) permits the trier of fact to compare a known sample, here the letter written to Ms. Taylor, with an unknown sample, here, several notations on returned packages sent to Mr. Zuccarini on behalf of EB. No handwriting expert is needed.

[9]The following exchange took place at the deposition:

Q. 957 Bristol Pike is not your residence?
A. No, it's not. It's my legal address. I have a lease on the apartment and that's where I have – some things are sent there which I get.

(Zuccarini Dep. at 10-11, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

Q. Do you intend to live [at the Andalusia address] in the future?
A. I don't think so, no. I don't think I will.
Q. Then it presumably is not your legal address.
A. It's my legal address. I don't have an address. If I don't live in one permanent place, you know, I can't – if I move somewhere different every week, I can't change my address every week on all my credentials. That's a lease I have an apartment on, that's where my tax returns are filed. It's the address I use.
Q. Do you receive mail there?
A. At that address, no. I receive – no. If it goes to that address, I won't get it.
Q. Because it is –
A. I'm not there.
Q. So the mail is not delivered?

At his deposition in the Maxim magazine matter, Mr. Zuccarini said that although he does not live at the Andalusia address he does maintain a lease there and he does use it as his address on official documents, including his tax returns. (Zuccarini Dep. at 10-11, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)). At one point, Mr. Zuccarini said that "some things are sent there [his Andalusia address] which I get." (Zuccarini Dep. at 10-11, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)). Later, he said that if mail "goes to that address, I won't get it." (Zuccarini Dep. at 12, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)). Mr. Zuccarini indicated that "lots of times" his mail is simply not delivered. (Zuccarini Dep. at 12, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)). According to Mr. Zuccarini, "some mail is forwarded" to a post office box. (Zuccarini Dep. at 12, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

This Court does not find credible the proposition that Mr. Zuccarini's receives mail in accordance to some unique postal system under which the mail is randomly delivered on some days and forwarded on others and on other days not delivered at all.

A. Lots of times, yes.
Q. How do you receive mail?
A. Some mail is forwarded?
Q. To where is it forwarded?
A. There is a post office box in Bensalem, Pennsylvania.
Q. Do you have the post office box?
A. Do I have the post office box?
Q. Yes. Can you say what the post office box is?
A. Yes. 1088 Bensalem, Pennsylvania.

(Zuccarini Dep. at 11-12, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

At the hearing, EB offered the testimony of Tony Durso, a letter carrier for the United States Postal Service. For the past 11 years, Mr. Durso has been responsible for mail delivery on the route that includes the Grandview Garden Apartments. Mr. Durso examined the packages sent to Mr. Zuccarini by Plaintiff's counsel. According to Mr. Durso, no postal employee would make handwritten notations on mail indicating that there was no forwarding address. (Hearing Trans. at 28, 25). In fact, in this case, it is not true that there is no forwarding address. There is a forwarding address on file – a post office box. Mr. Durso takes mail directed to Mr. Zuccarini at the Andalusia address and puts it in box 1088 or gives it to the person in charge of stuffing post office boxes to put in box 1088. (Hearing Trans. at 27). Notices are placed in the box when certified mail is received, which often happens, as Mr. Zuccarini gets a large volume of certified mail. (Hearing Trans. at 27). On September 15, 2000, certified mail from Plaintiff's counsel containing a copy of the summons and complaint was stamped "unclaimed" because Mr. Zuccarini did not pick it up. (Hearing Trans. at 28). According to Mr. Durso, Mr. Zuccarini empties his post office box periodically and had done so in the days prior to the hearing. (Hearing Trans. at 27).

3. Other proper methods of service were unavailable to EB.

While it would have been appropriate for EB to accomplish service by handing a copy of the complaint and summons to an adult member of Mr. Zuccarini's family who resides with Mr. Zuccarini, to someone of suitable age and discretion living with Mr. Zuccarini, to Mr. Zuccarini's agent at his place of business, or to an agent authorized to receive service of process for Mr. Zuccarini, none of these methods were available to EB in this case. According to Ms. Taylor, Mr. Zuccarini is and has been the only person on the lease at the Andalusia address since Mr.

Zuccarini moved in approximately 15 years ago, and, to her knowledge, he has been the only one to live there in recent years. (Hearing Trans. at 22, 25). In addition, in 11 years, Mr. Durso has not delivered mail to anyone else at the Andalusia address. (Hearing Trans. at 26). Further, since August of 1998, Mr. Zuccarini has been conducting business from his home in Andalusia. (Zuccarini Dep. at 15, Shields v. Zuccarini, No. 00-494 (E.D. Pa. Feb. 23, 2000)). Finally, the Court is not aware of any agent authorized to accept service of process on behalf of Mr. Zuccarini.

B. Constitutional Requirements

In order to comport with due process, the service of process must provide "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. "Personal service has not in all circumstances been regarded as indispensable to the process due residents[.]" Mullane, 339 U.S. at 314. In fact, the Supreme Court has determined that sending a copy of the summons and complaint by certified mail satisfies the requirements of due process as it is reasonably calculated to inform the defendant of the pendency of an action against him. See Nikwei v. Ross Sch. of Aviation, Inc., 822 F.2d 939, 944 (10th Cir. 1987) (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. State of Washington, 326 U.S. 310 (1945)).

Fulfillment of the due process requirements necessitates that the "means employed [] be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." Mullane, 339 U.S.

at 316 (citations omitted). There is no question that EB has acted in good faith to ensure that Mr. Zuccarini was notified of the pendency of this action within enough time to present him with the opportunity to be heard.

Even before the filing of the complaint, EB endeavored to notify Mr. Zuccarini of the institution of this action. As stipulated by Mr. Neu, on August 4, 2000, counsel for EB notified Mr. Neu that EB intended to file suit against Mr. Zuccarini. (Stipulated Testimony of Howard M. Neu No. 3). Mr. Neu then called Mr. Zuccarini and informed him that suit was going to be commenced against him.[10] (Stipulated Testimony of Howard M. Neu No. 4). While not

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[10] As recently as October of 2000, Mr. Zuccarini contended that he had no knowledge of the pendency of this action. During his deposition in the Maxim magazine case on October 16, 2000, Mr. Zuccarini stated that he was not familiar with this case and had not heard about it at all. (Zuccarini Dep. at 147, Dennis Maxim, Inc. v. Zuccarini, No. 00-2104 (S.D.N.Y. Oct. 16, 2000)).

Mr. Zuccarini's refusal to admit that he has known about this action is appalling. Mr. Neu claims that on August 4 of 2000, he informed Mr. Zuccarini that this action was going to be commenced against him. (Stipulated Testimony of Howard M. Neu No. 2-3). On August 10, 2000, Mr. Neu told Mr. Zuccarini that this action had been filed and sent a copy of the complaint and motion to Mr. Zuccarini. (Stipulated Testimony of Howard M. Neu No. 4). According to Mr. Neu, he had been engaged to represent Mr. Zuccarini in this matter at some point on or before October 13. (Stipulated Testimony of Howard M. Neu No. 5).

In addition to being notified of these proceedings by his lawyer, Mr. Zuccarini was again informed on August 14, 2000 when Tom Fisher, general manager of Cavecreek Wholesale Internet Exchange, which is the company that maintained the servers for the domain misspellings, sent Mr. Zuccarini an e-mail to inform him that the domain misspellings were being disabled in accordance with the temporary restraining order issued by this Court. (Pl. Exh. 16 at Exh. Fisher 3). In response by e-mail sent the next day, Mr. Zuccarini asked Mr. Fisher to "please reactivate the domains as soon as possible." (Pl. Exh. 16 at Exh. Fisher 4). Mr. Zuccarini also wrote: "Tom, I have received absolutely nothing about this electronic [sic] boutique case and neither has my lawyer. Any restraining order would be directed at me not your company, and I have received nothing, thererfore [sic] the restraining order is invalid. I must be served before it can take effect and I have not been. As a hosting company you are not responsible for the content of my websites. Your company is not in jepordy [sic]." (Pl. Exh. 16 at Exh. Fisher 4).

dispositive of the sufficiency of service, it is not insignificant that EB's efforts resulted in vesting Mr. Zuccarini with actual knowledge of these proceedings.

Then, on August 10, 2000, after being informed by Mr. Neu that Mr. Neu was not being retained in this matter, Plaintiff's counsel called the phone number that Mr. Zuccarini listed on his registration of the domain misspellings and left two voice message for Mr. Zuccarini informing him of the filing of the complaint and motion for temporary restraining order and preliminary injunction. (First Weiner Decl. at ¶ 2). That evening, counsel for EB left another voice message notifying Mr. Zuccarini of the entry of the temporary restraining order. (First Weiner Decl. at ¶ 3). In each message, counsel for EB requested that Mr. Zuccarini return his call or secure counsel to return his call. (First Weiner Decl. at ¶ 3-4). Mr. Zuccarini did not respond and no one responded on his behalf. (First Weiner Decl. at ¶ 4). Again, on August 14, a message was left for Mr. Zuccarini by counsel for EB. (First Weiner Decl. at ¶ 5). No response was received. (First Weiner Decl. at ¶ 5). EB's attempts at formal service were equally as diligent.

While it does not appear that the Third Circuit has been confronted with a factually similar case, courts of appeals in other circuits have deemed service accomplished where the defendant purposefully avoided service. In Swaim v. Moltan Co., 73 F.3d 711, 721 (7th Cir. 1996), the Seventh Circuit affirmed the district court's entry of a default judgment and denial of defendant's motion to vacate judgment, emphasizing the defendant's "continued effort to avoid service of process and frustrate the efficient administration of justice." In Swaim, service was attempted by: (1) certified mail of the complaint and summons which was returned "unclaimed;"

(2) private process server, who left the papers at the feet of the secretary of defendant company's chief executive after the secretary refused to accept the papers. The papers were subsequently mailed back to the process server's office; (3) delivery of the complaint and summons to the Indiana Secretary of State, the defendant's designated agent under Indiana law, who mailed the papers to defendant by certified mail. The mail was returned "unclaimed." Id. at 715-16.

In Nikwei v. Ross Sch. of Aviation, Inc., 822 F.2d 939, 946 (10th Cir. 1987), the Tenth Circuit affirmed the trial court's denial of the defendant's motion to set aside default, concluding that "the facts established that the defendant had both reasonable notice of the action instituted against him and an opportunity to defend against it." The record in Nikwei indicated that the Plaintiff attempted to serve the defendant by certified mail at his rented residence. Id. at 940. The receipt was returned marked "refused." Id. The court of appeals determined that the trial court record was "replete with evidence indicating that [the defendant] or his wife did indeed refuse service." Id. at 941.

III. CONCLUSION

The service of process is not a game of hide and seek. Where service is repeatedly effected in accordance with the applicable rules of civil procedure and in a manner reasonably calculated to notify the defendant of the institution of an action against him, the defendant cannot claim that the Court has no authority to act when he has willfully evaded the service of process.

In this case, the Defendant was made aware that he was being accused of infringing the intellectual property rights of EB on June 27, 2000, when he received the cease and desist letter sent by Plaintiff's counsel. He was notified about this action days before its commencement. He could have availed himself of the opportunity to defend this action on the merits or appear

specially to contest jurisdiction. Mr. Zuccarini is well-versed in the procedural aspects of this type of litigation.[11] He also had the benefit of legal advice from an attorney at all stages of the proceedings. Mr. Zuccarini was provided all the process he was due.

Since receiving the cease and desist letter on June 27, Mr. Zuccarini embarked on a campaign orchestrated to avoid involvement in this action. He hid at a local hotel. He returned mail sent to him by Plaintiff's counsel. He refused to pick up certified mail. He ignored phone messages from Plaintiff's counsel and the United States Marshals' Service. He denied all knowledge of these proceedings. He directly violated the Orders of this Court. Despite being given a forum to do so, Mr. Zuccarini declined to offer a single explanation for any of his actions. Mr. Zuccarini chose instead to actively obstruct the fact-finding process by refusing to appear for deposition, in violation of this Court's Order, and through the repeated prevarications of Mr. Zuccarini himself and his attorney.

This case is unlike many civil actions in which the alleged injury to the plaintiff has already occurred. The ongoing nature of the injury to the plaintiff in a cybersquatting action distinguishes this type of case. The longer that the defendant can delay proceedings and maintain the status quo, the longer he can continue to collect profits. To that end, Mr. Zuccarini attempted to persuade the web server not to honor the Temporary Restraining Order of this Court.

Therefore, where a defendant has actual knowledge that a lawsuit has been commenced against him, he cannot assert a post-judgment defense of lack of personal jurisdiction after

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[11] See Electronics Boutique Holdings Corp. v. Zuccarini, 2000 WL 1622760, at *7 (E.D. Pa. Oct. 30, 2000) (noting that Mr. Zuccarini "has victimized a wide variety of people and entities[,]" has been permanently enjoined from using other domain misspellings, has been sued by at least seven other plaintiffs, and has been asked by at least three companies to cease similar conduct).

willfully evading repeated attempts at service. Mr. Zuccarini engages in such gamesmanship at his own peril. This Court will not countenance the Defendant's continued and studied deceit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELECTRONICS BOUTIQUE HOLDINGS CORP.,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	
JOHN ZUCCARINI, individually and trading as Cupcake Patrol and/or Cupcake Party,	:	**NO. 00-4055**
Defendant	:	

ORDER

AND NOW, this 25th day of January 2001, it is hereby ORDERED as follows:

1. Defendant's motion to set aside judgment (Document No. 15) is DENIED.

2. Pursuant to 15 U.S.C. § 1117(a), Defendant is assessed the costs associated with the defense of Defendant's motion, including counsel fees, in the amount of $23,937.95.

BY THE COURT:

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Berle M. Schiller, J.